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The obligation to extradite or prosecute (*aut dedere aut judicare*)

Comments and information received from Governments

I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 62/66 of 6 December 2007, which, inter alia, invited Governments to provide to the International Law Commission information on practice regarding the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

2. At its fifty-eighth session in 2006, the Commission decided in accordance with article 19 (2) of its Statute to request, through the Secretary-General, Governments to submit information concerning their legislation and practice, particularly more contemporary ones, with regard to this topic. More specifically, Governments were requested to provide information concerning:

"(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservation made by that State to limit the application of this obligation;

"(b) Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

"(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

"(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State".[1]

[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 30.

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3. At its fifty-ninth session in 2007, the Commission further requested Governments to submit information concerning their relevant legislation and practice, particularly more contemporary ones, more specifically on:

"(a) International treaties by which a State is bound, containing the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

"(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

"(c) Judicial practice of a State reflecting the application of the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

"(d) Crimes or offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of a State; is it connected with the obligation *aut dedere aut judicare*?"[2]

4. At the same session, the Commission also indicated that it would appreciate information on the following questions:

"(a) Whether the State has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality?

"(b) Whether the State has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals?

"(c) Whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and if so to what extent?"[3]

5. Comments received at the sixtieth session of the Commission were reproduced in document A/CN.4/599. Since then, and as at 30 March 2009, written observations have been received from the following six States: Argentina, Belgium, Canada, Mexico,[4] South Africa and Yemen.

II. Comments and information received from Governments

Argentina

[Original: Spanish]

6. With reference to the Commission's question reproduced in paragraph 3 (a) above, Argentina is a party to the following multilateral treaties containing the obligation *aut dedere aut judicare*, in respect of which it has not made any reservations or declarations to limit the application of the obligation: Convention on

[2] Ibid., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 31.

[3] Ibid., para. 32.

[4] The comments received from Mexico contained the statement delivered in the Sixth Committee on 3 November 2008 and are not reproduced in the present document. For a summary of that statement, see A/C.6/63/SR.23, paras. 58-60.

Extradition adopted by the Seventh International Conference of American States, 1933; Convention for the Suppression of Unlawful Seizure of Aircraft, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973; International Convention against the Taking of Hostages, 1979; Convention on the Physical Protection of Nuclear Material, 1980; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984; Inter-American Convention to Prevent and Punish Torture, 1985; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1988; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988; Convention on the Safety of United Nations and Associated Personnel, 1994; Inter-American Convention on International Traffic in Minors, 1994; Inter-American Convention on Forced Disappearance of Persons, 1994; Inter-American Convention against Corruption, 1996; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 1997; International Convention for the Suppression of Terrorist Bombings, 1997; International Convention for the Suppression of the Financing of Terrorism, 1999; United Nations Convention against Transnational Organized Crime, 2000; United Nations Convention against Corruption, 2003.

7. Argentina has concluded bilateral extradition treaties containing the obligation *aut dedere aut judicare* with the following countries: Australia, 1988; Belgium, 1886; Bolivia, 1898; Brazil, 1961; Colombia, 1922; Italy, 1987; the Netherlands, 1893; Paraguay, 1996; the Republic of Korea, 1995; Spain, 1987; and Switzerland, 1906. These bilateral treaties provide for the person whose extradition is sought to be prosecuted by the courts of the requested State, if that State does not grant extradition on the grounds that the person in question is one of its nationals.

8. With reference to the Commission's question reproduced in paragraph 3 (b) above, in the legal system of Argentina, Act No. 24,767 governs international cooperation in criminal matters, including extradition proceedings. This legislation does not make general provision for the obligation *aut dedere aut judicare* but provides for this obligation only where the person whose extradition is sought is an Argentine national. Thus, according to article 12: "If the person sought for prosecution is an Argentine national, that person may opt to be placed on trial by the Argentine courts, unless a treaty providing for the compulsory extradition of nationals is applicable to the case (...). If the national exercises this option, the extradition will be refused. The national will then be placed on trial in Argentina, in accordance with Argentine criminal law, provided that the requesting State consents, waiving its jurisdiction, and provides all background information and evidence needed for the trial (...)". It should be noted that, although Act No. 24,767 does not make general provision for the obligation to extradite or prosecute, the application of this obligation may derive from any of the treaties mentioned in paragraphs 6 and 7 above, since the same Act establishes that "if a treaty exists between the requesting State and the Argentine Republic, its provisions shall govern the assistance procedure".

9. Furthermore, Act No. 26,200, which incorporates the provisions of the Rome Statute of the International Criminal Court into the Argentine legal system, expressly provides for the application of the *aut dedere aut judicare* principle in the case of crimes within the Court's jurisdiction. According to article 4 of the Act: "Where a person suspected of having committed a crime as defined in this Act is in the territory of the Argentine Republic or in a place subject to its jurisdiction and that person is not extradited or handed over to the International Criminal Court, the Argentine Republic shall take all necessary steps to exercise its jurisdiction with respect to that crime".

10. With regard to the Commission's question reproduced in paragraph 3 (c) above, Argentine courts strictly apply the provisions of Act No. 24,767 in extradition cases. Under this law, if an extradition treaty exists between the requesting State and the Argentine Republic, the extradition is governed by the provisions of that treaty. If no such treaty exists, the Argentine Republic makes extradition contingent on the existence or offer of reciprocity. Extradition is also subject to other rules, both formal and substantive, laid down in Act No. 24,767.

11. According to the records of the national body designated as the central authority with regard to international legal cooperation, the obligation *aut dedere aut judicare* has been applied in Argentine judicial practice only in cases where extradition has been refused on the grounds of the nationality of the person sought. This has occurred in a limited number of cases since Act No. 24,767 came into force, none of which have reached judgment, owing to the failure on the part of the requesting foreign courts to provide the relevant background information.

12. It should be noted that the obligation *aut dedere aut judicare* would be enforceable in Argentina only in the case of passive extradition requests where the person sought was an Argentine national and where no treaty was applicable. This is pursuant to the provisions of article 12 of Act No. 24,767, which sets out three possible scenarios regarding the extradition of a national: (a) no treaty is applicable; (b) the treaty applicable does not provide for an extradition request to be refused on the grounds of the nationality of the person sought; and (c) the extradition of nationals is optional under the applicable treaty, in which case the decision is taken by the Argentine executive branch. Among these three possible scenarios, the obligation to extradite or prosecute is, in practice, relevant only to the first: in cases where the national opts for trial by the Argentine courts, the extradition request must be refused. The obligation could also be applicable in the third scenario although, in the cases decided to date, the principle of the surrender of nationals has been applied as it is more consistent with modern extradition practice and the spirit of international cooperation in criminal matters.

13. With reference to the Commission's question reproduced in paragraph 3 (d) above, Act No. 24,767 lists only those offences for which extradition will not be granted, namely political offences and offences that are recognized solely under military criminal law. All other offences recognized under Argentine criminal law are therefore extraditable offences, provided that the general rules laid down in Act No. 24,767 are followed. It should be noted that article 9 (g) of Act No. 24,767 specifies that "offences in respect of which the Argentine Republic has assumed an international treaty obligation to extradite or prosecute" shall not be considered as political offences for extradition purposes.

Belgium

[Original: French]

14. With reference to the Commission's question reproduced in paragraph 3 (a) above, in the view of Belgium, the issue is to determine which of the treaties by which Belgium is bound contain the obligation *aut dedere aut judicare* and to what extent that obligation implies universal jurisdiction. The answer varies from treaty to treaty.

15. At the outset, however, it is necessary to make a distinction between two types of provision on the basis of which a State's universal jurisdiction may be established:

(a) Treaties which make the obligation to prosecute conditional upon refusal of a request for extradition of the alleged perpetrator of an offence. These treaties contain an *aut dedere aut judicare* clause in the classic sense of the word;

(b) Treaties which require States to exercise universal jurisdiction over perpetrators of the serious offences covered by these conventions, without making this obligation conditional upon refusal to honour a prior extradition request. These treaties contain a *judicare vel dedere* clause.

16. The following is a non-exhaustive list of treaties with an *aut dedere aut judicare* clause and the condition of a refusal to extradite:

(a) The Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) of 16 December 1970 (ratified by Belgium on 24 August 1973), article 7 of which contains an obligation *aut dedere aut judicare* [Belgium then reproduced a portion of the text of this article];

(b) The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal Convention) of 23 September 1971, ratified by Belgium on 13 August 1976, article 5, paragraph 2;

(c) The European Convention on the Suppression of Terrorism of 27 January 1977, ratified by Belgium on 31 October 1985, article 7.

17. The following is a non-exhaustive list of treaties with a *judicare vel dedere* clause without the condition of a refusal to extradite:

(a) The Geneva Conventions of 12 August 1949 (ratified by Belgium on 3 September 1952) establish this in their common articles 40, 50, 129 and 146 [text of the common articles omitted]. In other words, the Geneva Conventions do not make the obligation to prosecute conditional upon a prior unmet extradition request. The State party must prosecute perpetrators of serious crimes who are in its territory. The State party may also elect not to prosecute if it prefers to extradite the person to a requesting State. Thus, the Conventions establish not an obligation *aut dedere aut judicare*, but what might be termed an obligation *judicare vel dedere*. The International Committee of the Red Cross jurists' commentary on the Geneva Conventions confirms this interpretation:

> The obligation on the High Contracting Parties to search for persons accused of having committed grave breaches imposes an active duty on them. As soon as a Contracting Party realizes that there is on its territory a person who has committed such a breach, its duty is to ensure that the person concerned is

arrested and prosecuted with all despatch. The necessary police action should be taken spontaneously, therefore, and not merely in pursuance of a request from another State;[5]

(b) The Convention against Torture of 10 December 1984 (ratified by Belgium on 25 June 1999) appears, at first sight, to base the obligation to exercise universal jurisdiction on *aut dedere aut judicare* since article 7 states [partial text of the article omitted]. Article 5, paragraph 2, tends to confirm the establishment of universal jurisdiction on the basis of *aut dedere aut judicare* by stating [text of the paragraph omitted]. Yet the Committee against Torture has considered that the obligation to prosecute was related to what Belgium has called an obligation *judicare vel dedere* rather than an obligation *aut dedere aut judicare*; on 17 May 2006, the Committee stated that "the obligation to prosecute the alleged perpetrator of acts of torture does not depend on the prior existence of a request for his extradition".[6] This interpretation of article 5, paragraph 2, of the 1984 Convention is an official interpretation of the Convention and, moreover, is consistent with the International Law Commission's statement in its draft Code of Crimes against the Peace and Security of Mankind concerning the suppression of such crimes;[7]

(c) The International Convention for the Protection of All Persons from Enforced Disappearance of 20 December 2006 also provides for universal criminalization of the *judicare vel dedere* type. In addition to the classic forms of jurisdiction (territorial and active personal jurisdiction) that the State party must exercise (article 9, paragraph 1), the Convention also states [text of article 11, paragraph 1, omitted].

18. To summarize, it is clear from these examples that the principle of universal jurisdiction is not necessarily connected with the *aut dedere aut judicare* rule and that for a number of international crimes, particularly crimes of international humanitarian law, universal jurisdiction takes the form of a *judicare vel dedere* rule instead.

19. Furthermore, in addition to these treaty obligations, which Belgium assumed by ratifying and implementing these instruments, Belgium considers that there are customary obligations which require States to incorporate universal jurisdiction rules into their domestic law in order to prosecute the alleged perpetrators of crimes so serious that they pose a threat to the international community as a whole, such as serious crimes of international humanitarian law (crimes against humanity and the crime of genocide). In Belgium's view, this treaty obligation to prosecute the perpetrators of serious crimes of international humanitarian law exists only where the alleged perpetrators are present in its territory.

20. Concerning the Commission's question reproduced in paragraph 3 (b) above, while Belgium has universal jurisdiction over certain crimes, this is not always related to *aut dedere aut judicare*.

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[5] Jean Pictet, ed., *Commentary on the Geneva Conventions of 12 August 1949 relative to the Protection of Civilian Persons in Time of War* (Geneva, International Committee of the Red Cross, 1956), p. 621.

[6] Communication No. 181/201, *Suleymane Guengueng et al. v. Senegal*, 17 May 2006, para. 9.7 (CAT/C/36/D/181/2001).

[7] *Yearbook of the International Law Commission*, 1996, vol. II, Part II, pp. 31 and 32.

21. For some of these offences, there is no international rule that requires the exercise of universal jurisdiction based on *aut dedere aut judicare*. This has not prevented Belgium from assuming universal jurisdiction so that its courts can investigate the crimes in question. As noted in the reply to the first question, the principle of universal jurisdiction is, therefore, not inextricably connected with the *aut dedere aut judicare* rule.

22. In addition, Belgium was a pioneer in establishing universal jurisdiction over serious crimes of international humanitarian law. The very broad universal jurisdiction regime established in this area by the Act of 16 June 1993, which essentially incorporated into Belgian law four Geneva Conventions and two protocols on war victims and was further expanded to include the crime of genocide and crimes against humanity by the Act of 10 February 1999, has nonetheless had to be restricted owing to abuse of this legislation. Wherever possible, however, the principles underlying the Acts of 1993 and 1999 have been maintained and the jurisdiction rules remain very broad since the ordinary law governing the exterritorial jurisdiction of Belgian courts has been adapted to the realities of modern international crime.

23. The following forms of extraterritorial jurisdiction are recognized by Belgian judges:

(a) Active personal jurisdiction: Belgian courts have jurisdiction over foreign nationals who have their primary residence in Belgium and who have committed an act defined as a crime or misdemeanour under Belgian law (Code of Criminal Procedure, Preliminary Title, articles 6-7); in the case of ordinary law crimes or misdemeanours other than those that threaten the State's external security, serious violations of international humanitarian law, terrorist acts or counterfeiting, the exercise of criminal jurisdiction is subject to the condition that the act in question must also be criminalized in the country in which the offence was committed (Code of Criminal Procedure, Preliminary Title, article 7);

(b) Passive personal jurisdiction: Belgian courts have jurisdiction over:

(i) Foreign nationals who have perpetrated, against a Belgian, an act defined as a crime in Belgium, provided that it is subject, in the country where the crime was committed, to a maximum sentence of more than five years' imprisonment (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 5);

(ii) Foreign nationals who have perpetrated a crime of international humanitarian law against a Belgian, a person recognized as a refugee in Belgium or a foreign national who has effectively, habitually and legally resided in Belgium for at least three years (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 1 bis);

(c) Protective jurisdiction: Belgian courts have jurisdiction over foreign nationals who have committed, while abroad, a crime or misdemeanour against the State's external security (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 1);

(d) Universal jurisdiction: Belgian courts have jurisdiction over foreign nationals who have committed, while abroad, some of the offences established in Belgian criminal law (some of which have been mentioned above). These include:

(i) Sexual offences perpetrated against minors, exploitation of prostitution or trafficking in persons (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 3, referring to articles 379 to 381 and 381 bis, paragraphs 1 and 3, of the Penal Code);

(ii) Female genital mutilation (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 3 (2), referring to article 409 of the Penal Code);

(iii) Failure to comply with some of the rules governing the activities of marriage brokers (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 3 (3), referring to articles 10 to 13 of the Act of 9 March 1993);

(iv) Acts of corruption (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 4, referring to articles 246-250 of the Penal Code);

(v) Acts of marine pollution (Act of 6 April 1995, article 17 bis);

(vi) Counterfeiting (Code of Criminal Procedure, Preliminary Title, article 10, paragraphs 2 and 3);

(vii) Serious violations of international humanitarian law (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 1 bis);

(viii) Terrorist acts (Code of Criminal Procedure, Preliminary Title, article 10, paragraph 6); and

(ix) Any offence which, under international treaty law or international customary law, must be prosecuted regardless of the country in which it was committed and of the nationality of its perpetrator(s) (Code of Criminal Procedure, Preliminary Title, article 12 bis). Belgian courts have jurisdiction on the basis of this provision even where Belgium has not refused an extradition request.

24. Concerning the Commission's question reproduced in paragraph 3 (c) above, Belgium's judicial practice in the area of universal jurisdiction is not connected with the obligation *aut dedere aut judicare*. Thus, when a Belgian judge was assigned to the criminal trials of individuals accused of having participated in the massacres committed in Rwanda from April to June 1994, this was done on the basis of jurisdiction established in the Act of 16 June 1993 on the punishment of serious violations of the 1949 Geneva Conventions and the 1977 Additional Protocols thereto, regardless of any extradition request made by another State.

25. Concerning the Commission's question reproduced in paragraph 3 (d) above, the reply is contained in the preceding paragraphs: universal jurisdiction is sometimes expressed not by *aut dedere aut judicare* but by *judicare vel dedere*.

26. Concerning the Commission's question reproduced in paragraph 4 (a) above, Belgium referred to its Extradition Act of 15 March 1874 (article 1, paragraph 1), as amended by the Acts of 28 June 1899, 31 July 1985 and 14 January 1999, which do not provide for extradition in cases not covered by a treaty. Furthermore, the law (article 1, paragraph 1) permits the extradition only of foreign nationals. Belgium therefore refuses to extradite its own nationals and agrees to extradite a foreign national only pursuant to a treaty between Belgium and the requesting State.

27. Concerning extradition for offences not covered by a treaty between Belgium and the requesting State, article 1, paragraph 2, of the Extradition Act states that

only acts which are criminalized under both Belgian law and the law of the other country and which are subject to a prison sentence of more than one year may give rise to extradition. In accordance with modern extradition law, this means that the offences that can give rise to extradition are those which, on the one hand, are criminalized both in Belgium and in the requesting State and which, on the other hand, are subject to a fairly serious sentence (more than one year's imprisonment) both in Belgium and in the requesting State. Thus, the determining factor is not the nature of the offence but its dual criminalization and the gravity of the sentence envisaged in the two States. Belgium would therefore refuse any request for extradition of the alleged perpetrator of an offence which was not criminalized both in Belgium and in the requesting State or which was not subject to a sentence of more than one year's imprisonment.

28. Concerning the extradition of nationals, although, as indicated above, the practice is prohibited under its extradition law, Belgium is bound by the Council of the European Union's framework decision of 13 June 2002, which established a European arrest warrant. This framework decision was implemented in Belgium through the Act of 19 December 2003. The 2002 framework decision and the 2003 Act call for the surrender of a person for whom a European arrest warrant has been issued by a State member of the European Union. That person may be a national of the State in which the arrest warrant is to be executed; this is, therefore, an exception to the principle that a State shall not extradite its own nationals. However, the framework decision and the Act provide that the executing State may make the surrender of its nationals subject to the condition that they are returned to their State of origin in order to serve there the custodial sentence or detention order passed against them in the State that issued the arrest warrant (framework decision, article 5, paragraph 3; Act of 2003, article 8).

29. In other words, Belgium agrees that within the framework of the European Union, a Belgian national shall be surrendered to a European Union member State pursuant to an arrest warrant issued for that person, but Belgium may make the surrender of its national to the State that issued the arrest warrant subject to the condition that the person must be returned to Belgium in order to serve there the sentence passed by the court of the State that issued the arrest warrant.

30. Concerning the Commission's question reproduced in paragraph 4 (b) above, if, by crimes "that do not involve one of its nationals", the question means crimes committed in other States by a foreign national, the answer is "yes": in the context of the extraterritorial jurisdiction recognized by Belgian law, Belgian judges may exercise jurisdiction, under various conditions established in Belgian criminal law, over crimes committed in other States by persons who are not Belgian nationals (see paragraphs 20 to 23 above).

31. Lastly, concerning the Commission's question reproduced in paragraph 4 (c) above, it has sometimes been maintained that the obligation to extradite or prosecute was a customary obligation. For example, in the *Lockerbie* case, which the Libyan Arab Jamahiriya, as claimant State, brought against the United Kingdom and the United States of America as respondents, Judge Weeramantry, in his dissenting opinion to the order on provisional measures, mentioned the "rule of customary

international law, *aut dedere aut judicare*";[8] however, Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, in a joint declaration on the same order, stated:

> Moreover, in general international law there is no obligation to prosecute in default of extradition. Although since the days of Covarrubias and Grotius such a formula has been advocated by some legal scholars, it has never been part of positive law.[9]

Belgium shares this opinion with respect to the criminal prosecution of the perpetrators of customary law crimes.

32. Concerning crimes of international law, Belgium considers the obligation to extradite or prosecute to be, in essence, a treaty obligation. It is, in fact, envisaged in a number of treaties that establish certain crimes as international offences (see the examples mentioned in paragraphs 14 to 19 above) and more generally, for offences under domestic law, in the European Convention on Extradition of 13 December 1957 (article 6, paragraph 2), in cases involving refusal to extradite a national.

33. However, Belgium considers that all States must cooperate in suppressing certain extremely serious crimes — particularly crimes of international humanitarian law (crimes against humanity, genocide and war crimes) — since such crimes pose a threat, both qualitatively and quantitatively, to the most fundamental values of the international community. This contribution to the suppression effort may take the form of direct prosecution of the alleged perpetrators of such crimes or of extradition of those responsible to any State that wishes to prosecute them. Thus, there is indeed an obligation to prosecute, but of a *judicare vel dedere* rather than an *aut dedere aut judicare* nature. This is a customary obligation which has numerous sources:

(a) The draft Code of Crimes against the Peace and Security of Mankind, prepared by the International Law Commission (see para. 17 above);

(b) Various General Assembly resolutions on the suppression of war crimes and crimes against humanity (i.e., resolutions 2840 (XXVI) of 18 December 1971, paras. 1, 2 and 4, and 3074 (XXVIII) of 3 December 1973, paras. 1-9);

(c) The many positions taken by the General Assembly and the Security Council concerning the need to combat impunity. See, for example, the General Assembly resolutions which require that the perpetrators of crimes of international humanitarian law be brought to justice in the case of, inter alia, Iraq (resolution 54/178 of 17 December 1999, para. 3 (d)), the Democratic Republic of the Congo (resolution 54/179 of 17 December 1999, para. 3 (d)), Haiti (resolution 54/187 of 17 December 1999, para. 8) and Rwanda (resolution 54/188 of 17 December 1999, para. 8). The Security Council has taken similar positions. For example, on the occasion of the Millennium Summit, the Council

> Stresse[d] that the perpetrators of crimes against humanity, crimes of genocide, war crimes, and other serious violations of international humanitarian law

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[8] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, order of 14 April 1992, Provisional Measures, dissenting opinion by Judge Weeramantry, pp. 69 (United Kingdom order) and 179 (United States of America order).

[9] Idem., joint declaration by Judges Evensen, Tarassov, Guillaume and Aguilar Mawdsley, pp. 24 (United Kingdom order) and 135 (United States of America order).

should be brought to justice (resolution 1318 (2000), of 7 September 2000, sect. VI; see also, inter alia, resolutions 1120 (1997) of 14 July 1997, para. 7, and 1325 (2000) of 31 October 2000, para. 11);

(d) The fourth through sixth paragraphs of the preamble to the Rome Statute of the International Criminal Court, in which the States Parties to the Statute affirm the need for the international community as a whole to combat impunity for the most serious crimes and recall the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

34. For all these reasons, Belgium considers that there is a universal obligation to suppress crimes of international humanitarian law. This obligation is customary in light of the many consistent positions expressed by the international community on this issue. It takes the form of "prosecute or extradite" rather than "extradite or prosecute". However, for serious offences other than crimes of international humanitarian law, there is only the obligation either to extradite or to prosecute, and this is solely a treaty obligation.

Canada

[Original: English]

35. Canada supports the work of the International Law Commission in this area. It remained interested in the potential scope of the topic, as it is of the view that the obligation to extradite or submit the matter for prosecution does not apply to all crimes. Canada welcomes further discussion of the source of the obligation and suggests that a systematic survey of the treaties that contain an obligation to extradite or prosecute would be useful. Canada also welcomes the Special Rapporteur's decision to refrain from further examination of the "triple alternative", as Canada considers surrender to an international criminal tribunal to differ substantively from an act of extradition, the latter involving bilateral State-to-State action.

36. In Canada, the obligation to extradite or prosecute applies to crimes of universal jurisdiction where provided by treaty and Canada has the capacity to extradite or prosecute for non-treaty based crimes of universal jurisdiction. As has been noted by the Special Rapporteur and in the submissions of other Governments, the alternative obligation to extradite or to prosecute assumes different forms in the multilateral treaties in which it has been embodied.

37. *Universal jurisdiction*. Where crimes are so serious and on such a scale that they can justly be regarded as an attack on the international legal order, the principle of universality provides jurisdiction for offences anywhere in the world. For example, the 1949 Geneva Conventions and the 1977 Additional Protocol provide for mandatory universal jurisdiction over grave breaches and require a party to either bring alleged offenders before its courts or else surrender them to another party for trial. In addition, piracy, serious violations of the laws and customs of war, crimes against humanity and genocide are generally recognized as subject to the universality principle.

38. Similarly, a number of multilateral anti-terrorism conventions require the parties to extradite or to exercise jurisdiction in cases where extradition is not granted (submit the case "without exception whatsoever" to the competent

authorities, with the qualification that those authorities must act as they would with any other "ordinary offence of a serious nature"), as appears in the Convention for the Suppression of Unlawful Seizure of Aircraft, adopted in 1970. This structure of the obligation has been replicated in a series of subsequent agreements on the repression of international offences concluded under the auspices of the United Nations or its specialized agencies and also appears in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984.

39. *Permissive exercise of extraterritorial jurisdiction over non-nationals where extradition is refused.* In other multilateral conventions, the alternative obligation to prosecute where extradition is refused is subject to the State's general posture with respect to the propriety of exercising extraterritorial jurisdiction. This framework is premised on the assumption that States which refuse to extradite their nationals will have no difficulty in trying them and provide, generally, that where the only reason for refusing extradition is the offender's nationality he should be punishable at home for the offence committed abroad. This formulation of the obligation may be found, for example, in the multilateral drug conventions, the United Nations Convention against Transnational Organized Crime, adopted in 2000, and the United Nations Convention against Corruption, adopted in 2003.

40. The latter framework, as with bilateral extradition treaties that provide an alternative obligation to extradite or prosecute, primarily addresses the concern that States who refuse to extradite their own nationals will offer a safe haven to alleged offenders who would otherwise escape prosecution for offences committed abroad.

41. Canada would caution against the adoption of an overly broad conception of the obligation to extradite or prosecute. It is Canada's view that for the vast majority of crimes, the obligation to extradite or prosecute does not and should not apply and, where applicable, the scope of the obligation should be defined by treaty. In this regard, Canada supports the inclusion of such provisions in multilateral treaties as part of the international community's collective efforts to deny a safe haven to terrorists and other criminals.

42. In Canada, extradition to another State is governed by the Extradition Act, Statutes of Canada, 1999, chap. 18 (available at http://laws.justice.gc.ca/en/showdoc/cs/ E-23.01), which came into force on 17 June 1999, and the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, chap. 11 (available at http://laws.justice.gc.ca/en/Charter/index.html). The Extradition Act, in tandem with the Charter, governs domestic proceedings for the extradition of an individual from Canada to another State and provides for three distinct extradition regimes: (a) pursuant to a bilateral or multilateral treaty; (b) to an extradition partner designated in the Schedule to the Extradition Act, or (c) on an exceptional basis to a non-designated, non-treaty partner in relation to a specific extradition request. The extradition of a person from another State at the request of Canada is dealt with pursuant to the provisions of any bilateral or multilateral treaty in force between Canada and the requested State, and the law of the requested State.

43. Canada is currently bound by 51 bilateral extradition treaties.[10] Although many bilateral treaties provide for the discretionary refusal of an extradition request where both Canada and the requesting State have jurisdiction to prosecute the offence for which extradition is sought, where there are ongoing proceedings in Canada against the individual for the offence for which extradition is requested and/or where the competent authorities in Canada have decided not to prosecute or to terminate a prosecution that had been initiated, none of Canada's bilateral treaties contain an obligation to extradite or submit the matter for prosecution. The Extradition Act also provides grounds on which the Minister of Justice may or must refuse extradition requests that apply when an extradition request is made in the absence of a treaty, including that surrender may be refused when there are criminal proceedings in Canada against the individual for the offence for which extradition is requested (subsection 47(d)). Canada also identified in its observations its extradition partners designated as such in the Schedule to the Extradition Act. The texts of Canada's bilateral extradition treaties are available on the Government of Canada's treaty information website (available at www.treaty-accord.gc.ca/).

44. Canada is also party to a number of multilateral treaties that contain an obligation to extradite or prosecute, including:

(a) *Universal*: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva I), adopted in 1949; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva II), adopted in 1949; Geneva Convention relative to the Treatment of Prisoners of War (Geneva III), adopted in 1949; Geneva Convention relative to the Protection of Civilian Persons in Time of War (Geneva IV), adopted in 1949; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted in 1977; Convention for the Suppression of Unlawful Seizure of Aircraft, adopted in 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted in 1971; United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, adopted in 1973; International Convention against the Taking of Hostages, adopted in 1979; Convention on the Physical Protection of Nuclear Material, adopted in 1980; United Nations Convention on the Law of the Sea, adopted in 1982; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, adopted in 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, adopted in 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, adopted in 1988; Convention on the Safety of United Nations and Associated Personnel, adopted in 1994; International Convention for the Suppression of Terrorist Bombings, adopted in 1997; International Convention for the Suppression of the Financing of Terrorism, adopted in 1999;

[10] A list of such bilateral treaties was enclosed and is available at the Codification Division of the Office of Legal Affairs.

(b) *Permissive*: Single Convention on Narcotics Drugs, adopted in 1961; Convention on Psychotropic Substances, adopted in 1971; Protocol Amending the Single Convention on Narcotics Drugs, 1961, adopted in 1972; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted in 1988; Inter-American Convention against Corruption, adopted in 1996; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted in 1997; United Nations Convention against Transnational Organized Crime, adopted in 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted in 2000; Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, adopted in 2000; and United Nations Convention against Corruption, adopted in 2003.

45. Canada is also a party to the Convention on the Prevention and Punishment of the Crime of Genocide, adopted in 1948, and the Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in 1963. While Canada recognizes that these two Conventions do not contain an explicit obligation to extradite or prosecute, it notes that they do require States to establish jurisdiction in respect of certain offences.

46. Canada has not sought to limit the application of this obligation in any of these multilateral treaties.

47. Canada has also signed, but has not yet ratified, the following treaties: Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives, and Other Related Materials, adopted in 1997; Convention on Cybercrime, adopted in 2001; Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime, adopted in 2001; Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems, adopted in 2003; and International Convention for the Suppression of Acts of Nuclear Terrorism, adopted in 2005.

48. In Canada, the obligation to extradite or submit the matter for prosecution applies to crimes of universal jurisdiction, whether recognized as such by treaty or by customary international law. Although there are no statutory or constitutional rules which directly address the obligation to extradite or prosecute, statutory provisions establishing extraterritorial jurisdiction for specified crimes enabling prosecution in Canada are included in the Criminal Code, Revised Statutes of Canada 1985, chap. 46 (available at http://laws.justice.gc.ca/en/ShowFullDoc/cs/C-46/), the Crimes Against Humanity and War Crimes Act, Statutes of Canada 2000, chap. 24 (available at http://laws.justice.gc.ca/en/showdoc/cs/C-45.9/) and the National Defence Act, Revised Statutes of Canada 1985, chap. N-5 (available at http://laws.justice.gc.ca/en/showdoc/cs/N-5/).

49. Where the applicable legislation does not extend jurisdiction extraterritorially, Canada's courts have determined that it is sufficient if there is a "real and substantial link" between the offence and Canada for Canadian courts to have jurisdiction (see further *Libman v. The Queen*, [1985] 2 *Supreme Court Reports* 178 (Canada), available at www.canlii.org/en/ca/scc/doc/1985/1985canlii51/1985canlii51.html).

50. Section 6(2) of the Criminal Code states the general rule that the territorial application of Canadian criminal law is limited to those offences committed in Canada, unless Canadian jurisdiction is specifically extended by federal law. Exceptions to the general rule that provides for trial in Canada of offences committed outside Canada are primarily outlined in section 7 of the Criminal Code. Section 7 of the Criminal Code extends Canadian criminal law jurisdiction to cover a number of offences which often have international law implications such as air piracy, offences against diplomats, terrorist offences, protection of nuclear material and torture. A number of the offences referred to in section 7 of the Criminal Code, such as torture (section 269.1), crimes against internationally protected persons (section 431) and terrorism offences (part II.1) were created to fulfil Canada's obligations under the international conventions listed above aimed at preventing and suppressing certain types of offences. Canadian jurisdiction is also extended in some circumstances in relation to the International Space Station (subsections 7(2.3) to 7(2.34)); defined circumstances relating to, among other things, internationally protected persons, United Nations personnel and terrorism offences (subsections 7(3) to 7(3.75)); offences committed outside Canada by Canadian public service employees (subsection 7(4)); and certain sexual offences when committed outside Canada by Canadian citizens or permanent residents (subsections 7(4.1) to 7(4.3)). However, the expanded jurisdiction provided in the Criminal Code is qualified by the requirement to obtain the consent of the Attorney General of Canada to institute proceedings against non-citizens (subsection 7(7)).

51. Sections 6, 7 and 8 of the Crimes Against Humanity and War Crimes Act also provide that the offences of genocide, crimes against humanity, war crimes, and breach of command responsibility in relation to genocide, a crime against humanity or a war crime committed outside Canada, may be prosecuted in Canada if at the time the offence is alleged to have been committed (a) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity, (b) the person was a citizen of a State that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a State, (c) the victim of the alleged offence was a Canadian citizen or (d) the victim of the alleged offence was a citizen of a State that was allied with Canada in an armed conflict. In addition, such offences may be prosecuted in Canada if, after the time the offence is alleged to have been committed, the person is present in Canada.

52. Canada also asserts specific extraterritorial jurisdiction in other limited circumstances, including offences committed by Canadian military personnel and other persons subject to the Code of Service Discipline (sections 67, 130 and 132 of the National Defence Act).

53. Canada notes that the obligation to submit a matter for prosecution, as the alternative where extradition is not possible, remains chiefly a concern for those States that refuse to extradite their own nationals. Canada allows, and regularly authorizes, the extradition of its own nationals; therefore, the application of this principle rarely, if ever, surfaces in Canada. As such, there is no particular practice concerning the obligation to extradite or prosecute in Canada, be it from a judicial, prosecutorial or law enforcement perspective, nor are there any particular crimes or offences to which this obligation is applied or not applied, as the Canadian courts only become seized of criminal matters once the relevant law enforcement authorities decide to lay charges and the Attorney General of Canada, or the relevant provincial Attorney General, undertakes a prosecution. The Government of Canada

is not aware of any judicial decisions in Canada that specifically apply the principle of the obligation to extradite or prosecute.

54. Where an extradition request is deemed deficient on evidentiary grounds, or owing to a lack of dual criminality from Canada's perspective, it follows that the relevant Canadian authorities would not be able to proceed with a prosecution for the same reasons. Where, on the other hand, the offence at issue in any extradition request is alleged to have occurred outside of Canadian territory, Canada would, except in certain exceptional circumstances, not be able to lay charges or proceed with a prosecution for want of jurisdiction.

55. Finally, decisions to initiate prosecutions, stay proceedings or launch appeals in Canada may take into account the public interest, but must not include any consideration of the political implications of the decision. No investigative agency, Government department or Minister of the Crown may issue instructions for the pursuit or discontinuance of a particular prosecution or to undertake a specific appeal. These decisions rest solely with the Attorney General (and his or her counsel) who must for these purposes be regarded as an independent officer, exercising responsibilities in a manner similar to that of a judge.

South Africa

[Original: English]

56. Before dealing with the specific questions asked by the International Law Commission, South Africa pointed out that it would have found an exposition on the Commission's understanding of the principles of universal jurisdiction, as well as its link, if any, with the principle of *aut dedere aut judicare* useful. It would also be useful to know how the study of universal jurisdiction will be incorporated into the Commission's project on *aut dedere aut judicare*.

57. In the absence of such an explanation, and for the purposes of its comments, South Africa explained that it had utilized the principle of universal jurisdiction as set out in the *Princeton Principles on Universal Jurisdiction*:

> "1. (...) Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
>
> "2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such a judicial body. (...)"[11]

It further noted that the serious crimes under international law specified in principle 2(1) include piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture.

58. South Africa is of the view that the extent to which universal jurisdiction is part of customary international law needs to be explored further, but at this stage it

[11] *The Princeton Principles on Universal Jurisdiction* (Princeton, New Jersey: Program in Law and Public Policy, 2001), p. 28 (available at http://lapa.princeton.edu/hosteddocs/unive_jur.pdf).

is probably only in relation to obligations *erga omnes*. For the rest, it is the Government's view that universal jurisdiction or even quasi-universal jurisdiction is treaty-based.

59. It is also the view of the Government that universal jurisdiction and *aut dedere aut judicare* are not automatically linked. As evidenced in the definition above, universal jurisdiction enables a State to establish jurisdiction — it does not create an obligation to prosecute or extradite. It is acknowledged that universal, or quasi-universal, jurisdiction and the principle of *aut dedere aut judicare* are often linked, especially in a treaty framework, but this does not necessarily mean that they are always linked, and certainly there is no link in terms of customary international law.

60. With reference to the Commission's question reproduced in paragraph 3 (a) above, in view of the fact that there seems to be some disagreement about which treaties establish universal jurisdiction, it would be useful to have an indication from the Commission in this regard. Some of the treaties which do have a concept of universal jurisdiction linked with the principle of *aut dedere aut judicare* are the 13 United Nations counter-terrorism treaties.

61. With reference to the Commission's question reproduced in paragraph 3 (b) above, South Africa is a party to the 13 United Nations counter-terrorism treaties mentioned in the previous paragraph. The *aut dedere aut judicare* principle has been given effect to through, for example, the Civil Aviation Offences Act 10 of 1972 and the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004.

62. While the Rome Statute does not confer universal jurisdiction on the International Criminal Court, individual States have enacted legislation to give some form of universal jurisdiction to their own courts to try international crimes recognized by the Rome Statute — genocide, crimes against humanity and war crimes. In South Africa, the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 empowers a South African court to exercise jurisdiction over a person who has committed such crimes outside South Africa if "that person, after the commission of the crime is present in the territory of the Republic". The incorporation legislation, Act 27 of 2002, enables the National Prosecuting Authority of the Republic to prosecute and the High Courts of the Republic to adjudicate in cases brought against any person accused of having committed a crime in the Republic and beyond the borders of the Republic in certain circumstances. "Crime" is defined as genocide, war crimes and crimes against humanity. It appears that these crimes are incorporated into South African domestic law irrespective of who has committed them and irrespective of where. There will also be jurisdiction if the crimes are committed in the territories of States not parties to the Statute.

63. With reference to the Commission's question reproduced in paragraph 3 (c) above, so far, no cases specifically referring to the obligation *aut dedere aut judicare* have been located.

64. With reference to the Commission's question reproduced in paragraph 4 (a) above, the Extradition Act 67 of 1962 contains no exemption for nationals. South Africa's approach towards nationality (citizenship) and extradition was examined by the Constitutional Court in *Geuking v. President of the Republic of South Africa* 2003 (3) SA 34 (CC), in which it was argued that the President, in exercising his

power to surrender a person to the Federal Republic of Germany under section 3(2) of the Act, had failed to have regard to the fact that the person was a South African national (citizen). Justice Goldstone, speaking for the court, said:

> "In the present case, the President stated in the affidavit he filed in the High Court that in deciding whether to grant his consent under section 3(2) of the Act the citizenship of the appellant would not have been a relevant consideration. I can find no constitutional ground for attacking that policy decision. Unlike the Federal Republic of Germany and many other civil law jurisdictions, South Africa does not ordinarily prosecute its citizens for crimes committed beyond its borders. Criminal conduct would go unpunished if South African citizens were not extradited to face prosecution in the country where the crime was committed. The President is therefore entitled to adopt a policy that is in the interests of the Republic to consent to a request for extradition proceedings against a person, regardless of his or her citizenship."

65. South Africa has the authority under domestic law to extradite persons in situations not covered by a treaty. Section 3(2) of the Act provides:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

The existence of a treaty is not necessary for extradition in terms of section 3(2) of the Act. This principle was confirmed in *Harksen v. President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC). In that case, the Constitutional Court confirmed the legality of extradition of the applicant to Germany notwithstanding the fact that there was no treaty.

66. In the context of the questions raised, however, all the requirements of extradition law must be adhered to. The Extradition Act therefore does not automatically provide authority to extradite on the principle of universal jurisdiction unless the particular crime has been incorporated into South African domestic law.

67. In reply to the Commission's question reproduced in paragraph 4 (b) above, South Africa referred to its observations contained in paragraphs 55 and 56 above.

68. With reference to the Commission's question reproduced in paragraph 4 (c) above, South Africa does not believe that the principle of *aut dedere aut judicare* has reached sufficient international recognition and widespread practice to be considered as part of international customary law and at this stage its legal status is still reliant on a treaty basis.

Yemen

[Original: Arabic]

69. Yemen stressed its respect for the international agreements, conventions and instruments to which it is a party and indicated that it fulfils its obligations thereunder. Article 6 of its Constitution provides as follows:

> "The Republic of Yemen confirms its adherence to the Charter of the United Nations, the Universal Declaration of Human Rights, the Charter of the League of Arab States and the generally recognized rules of international law."

70. While article 45 of the Constitution states that no Yemeni citizen may be extradited, the relevant laws affirm that criminals shall be prosecuted and sentenced fairly. Article 3 of the Penal Code that was promulgated by Republican Decree No. 12 of 1994 provides as follows:

> "This law shall apply to all crimes that are perpetrated within the State, whatever the nationality of the perpetrator. The crime shall be considered as perpetrated within the State if any of its constituent parts takes place within the State; when all or part of the crime is perpetrated within the State, this law shall apply to anyone who participated therein, even if their participation did not take place within the State. This law shall also apply to crimes that are perpetrated beyond the State and shall be dealt with by the Yemeni courts in accordance with the Law of Criminal Procedure."

71. Yemen has signed with a number of fraternal and friendly countries the following bilateral agreements on the extradition and prosecution of criminals: agreement on cooperation in the field of internal and public security concluded with Jordan; security cooperation agreement concluded with the Libyan Arab Jamahiriya; bilateral cooperation agreement between the Ministries of the Interior of Yemen and Djibouti, with executive programme; agreement concluded with Egypt on the transfer of imprisoned convicted criminals, and security cooperation agreements concluded bilaterally with Saudi Arabia, Egypt, Algeria and Ethiopia.

72. Yemen is also a party to the following international agreements on the extradition and prosecution of criminals: the Riyadh Arab Agreement for Judicial Cooperation, signed by Yemen and ratified by Law No. 36 of 1983; and the Arab Anti-Terrorism Agreement, signed in 1998 in Cairo and ratified by Yemen by Law No. 34 of 1999.